

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANCENE GREWE and LORI EBERHARD, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

COBALT MORTGAGE, INC.,

Defendant.

No. 2:16-cv-00577-JCC

JOINT BRIEFING IN SUPPORT OF
SECOND MOTION FOR APPROVAL
OF FLSA COLLECTIVE ACTION
SETTLEMENT AND AWARD OF
FEES

I. INTRODUCTION

Plaintiffs Francene Grewe and Lori Eberhard and Defendant Cobalt Mortgage, Inc. (collectively, the “Parties”) jointly submit this additional briefing as ordered by the Court to address certain issues raised by the Court with regard to the approval of a proposed FLSA Collective Action Settlement in this matter previously submitted by the Parties. The Parties maintain that the prior settlement is a fair and reasonable resolution of the Parties’ bona fide disputes as to liability and damages under the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* Therefore, after reviewing this additional briefing, the Parties respectfully request that the Court approve their settlement.

II. PROCEDURAL BACKGROUND

A. The Parties Agreed To Mediate After Cobalt Refused To Absorb New Job Classifications Into The Existing *Wheeler* Settlement

The procedural background of this *Grewe* case is informed by the procedural history and settlement of the *Wheeler* matter approved by the Court earlier this year. In *Wheeler*, Rowdy Meeks, counsel for Plaintiffs, represented Plaintiff Shannon Wheeler, a former Cobalt Mortgage Loan Officer (“MLO”). Declaration of Rowdy B. Meeks (“Meeks Decl.”), ¶ 4. Wheeler filed a collective action against Cobalt seeking unpaid overtime. The parties settled that case and the Court approved the settlement. During the course of administering the settlement, Grewe and Eberhard, two former Cobalt employees, learned about the suit and contacted Mr. Meeks. Meeks Decl., ¶ 4. Cobalt employed Grewe as a Production Partner and Eberhard as an MLO Assistant (“MLOA”). Complaint, ¶¶ 1-2 (Dkt 1). Neither job classification was covered by the *Wheeler* settlement as it was limited to MLOs. Three months after the *Wheeler* settlement had been approved, Meeks contacted Cobalt’s counsel and asserted that Cobalt had also failed to pay all Production Partners and MLOAs in the United States for all overtime hours worked. Meeks asked Cobalt to expand the *Wheeler* settlement to include the two job classifications and increase the gross settlement amount proportionate to the number of additional employees. Meeks Decl., ¶ 5; Declaration of Taylor Ball (“Ball Decl.”), ¶ 2. Cobalt did not agree with Meeks’ proposal

1 because the *Wheeler* case had been closed and MLOs, Production Partners, and MLOAs are
 2 three distinct job classifications with different responsibilities and compensation structure.
 3 Meeks Decl., ¶ 5; Ball Decl., ¶ 3. Specifically, the compensation model for MLOs and
 4 Production Partners, who are paid on a commission basis, differs dramatically from that of
 5 MLOAs, who are paid based on a fixed hourly rate or a fixed hourly rate supplemented with
 6 commissions. Given these differences and the procedural posture of the *Wheeler* case, Cobalt
 7 did not agree that it was appropriate to simply lump a nationwide collective action of Production
 8 Partners and MLOAs into the *Wheeler* settlement for MLOs. Ball Decl., ¶ 3. The Parties did,
 9 however, agree to conduct a pre-complaint mediation over Grewe's and Eberhard's claims on
 10 behalf of Production Partners and MLOAs. Meeks Decl., ¶ 5; Ball Decl., ¶ 4. The Parties
 11 agreed to use Theresa Wakeen as a mediator; since she previously mediated the *Wheeler* action,
 12 the Parties believed she would have some familiarity with the issues and the mediation would,
 13 therefore, be more efficient. Ball Decl., ¶ 4.

14 **B. Cobalt Argued At the Grewe Mediation That MLOAs And Production**
 15 **Partners Earned Less And Worked Fewer Hours Than MLOs in the Wheeler**
 16 **Class**

17 Prior to mediation, Cobalt provided Plaintiffs with compensation and hours data for all
 18 Production Partners and MLOAs employed on a nationwide basis during the agreed statute of
 19 limitations. Weiss Decl., ¶ 3 (Dkt. 23). In the *Wheeler* case, Cobalt deposed Ms. Wheeler and
 20 two other MLOs who agreed to opt in to the class. Ball Decl., ¶ 5. All three individuals testified
 21 that they worked approximately 50 hours per week. *Id.* Because of the nature of their work,
 22 both MLOAs and Production Partners work fewer hours than MLOs. Cobalt presented payroll
 23 data to Plaintiffs supporting its position that MLOAs and Production Partners regularly recorded
 24 and were paid for overtime hours during the relevant time period. MLOAs and Production
 25 Partners were also, generally, compensated less than MLOs because they are not primarily
 26 responsible for generating new business. Cobalt, therefore, took the position at mediation that
 27 the overall settlement for MLOAs and Production Partners on a nationwide basis would be less
 than the *Wheeler* settlement even though both cases had approximately the same number of

putative collective members. Weiss Decl., ¶ 4. Based on Cobalt's position, the data it provided, the information that Plaintiffs had collected regarding MLOAs and Production Partners, and the prior discovery conducted in the *Wheeler* matter, the Parties, with the assistance of a third-party mediator, negotiated the present settlement agreement submitted to the Court for approval. Weiss Decl., ¶ 8.

C. The Court Requests Additional Information After Eric Engelland Intervenes

Eric Engelland is a former Cobalt Production Partner who filed a Rule 23 class action against Cobalt in Washington state court. Engelland seeks to represent a class of those Production Partners who were previously employed by Cobalt in Washington State. He is not seeking to represent a nationwide class of Production Partners, nor could he because he has not alleged claims pursuant to the FLSA. Engelland is joined in his lawsuit by Shari Bell-Beals and Alan Thain, former MLOs. None of the three plaintiffs ever held the position of MLOA and there is not a named class representative in their lawsuit who held the MLOA position. A class has not been certified in that action. As such, Engelland's objections must be limited to the portion of the *Grewe* settlement related to Production Partners only and not the *Grewe* settlement of MLOA claims.

Engelland sought to intervene in this action to challenge the settlement because he believes that he is entitled to more money than he would receive were he to choose to opt-in to the *Grewe* settlement. Engelland grossly miscalculates his damages, which actually range between \$42,000 to \$50,000 assuming ten hours of off-the-clock work per week. Nickerson Decl. ¶ 16 (Dkt. 24). His damages are not representative of other putative collective members' potential recoveries because Engelland's potential damages are in the 98th percentile and at least three standard deviations away from the average. *Id.* ¶ 17. Many Production Partners that Plaintiffs' counsel spoke with did not work any overtime at all. Meeks Decl. Opposing Intervention, ¶ 9 (Dkt. 21-1). Engelland further speculates, without any evidence, that the settlement was the result of collusion between Plaintiffs and Cobalt. Engelland's counsel subsequently informed the Parties that he only objects to the settlement to the extent it applies to

former Production Partners based in Washington State; he is not challenging the settlement as it might apply to the claims of Production Partners located outside of Washington State or MLOAs nationally. Meeks Decl., ¶ 6. Furthermore, as set forth in Cobalt's Opposition to Eric Engelland's Motion to Intervene and Response to Objections to Settlement, the settlement of the claims in the *Grewe* case in no way forecloses Engelland's rights to pursue his claims in Washington state court in the *Bell-Beals* action. *See* Dkt. 22. The only way that Engelland's ability to seek compensation for the overtime and other claims set forth in the *Bell-Beals* complaint is if he affirmatively elects to join the *Grewe* settlement by filling out a claim form and sending it to the claims administrator overseeing the settlement. If he does not join the *Grewe* settlement, no waiver or release of his claims will have occurred, and he will be free to pursue those claims in the action pending in Washington state court.

On June 14, 2016, the Court granted Engelland's motion to intervene and denied the Parties' Motion to Approve the Settlement without prejudice. The Court asked the Parties to jointly submit additional briefing as to four issues. In accordance with these instructions, the Parties submit this joint brief.

III. ADDITIONAL BRIEFING

A. The Parties Considered the Liability of Corporate Officers in This Case.

The Court has requested the Parties provide additional briefing to "show cause as to why additional claims were not pursued against potentially liable corporate officers in this case." Order at 8.

Corporate officers who have control over the employer's operations may be held *jointly and severally* liable for the employer's failure to pay employees consistent with the FLSA. *Boucher v. Shaw*, 572 F.3d 1087, 1094 (9th Cir. 2009). Such individual liability is based on the FLSA's definition of employer. *See* 29 U.S.C. § 203(d) (defining "employer"). Plaintiffs, therefore, do not have *additional unique* claims against Cobalt's potentially jointly and severally liable corporate officers. Rather, in the unlikely event that Cobalt was not able to satisfy a

1 judgment or became insolvent, Plaintiffs would be able to recover against corporate officers
2 provided they could demonstrate the requisite amount of control under the FLSA.

3 Here, all Parties were aware that certain corporate officers could be held jointly and
4 severally liable for Cobalt's alleged failure to pay employees consistent with the FLSA. Weiss
5 Decl., ¶ 6 (Dkt. 23); Meeks Decl., ¶ 7. Keith Tibbles, one of the potentially liable individual
6 officers, personally attended and participated in the entire mediation. Tibbles Decl., ¶ 6.
7 Further, the Parties' settlement agreement acknowledges the corporate officers' potential liability
8 by individually naming them as released parties. *See* Settlement Agreement, ¶ 9.1. While all
9 Parties acknowledged that the corporate officers *could* be added as individually-named
10 Defendants to the action, there was no need to do so. Cobalt's bylaws indemnify both Mr.
11 Tibbles and Mr. Gehre against all losses, claims, damages, liabilities and expenses, including
12 those incurred in the *Grewe* case. Ball Decl., ¶ 6, Ex. A. And even though Cobalt is in wind-
13 down mode and no longer generating new loans with a revenue stream, its existing resources
14 were easily sufficient to cover the settlement amount. *See* Section III.C, *infra*.

15 Therefore, while all Parties were aware that the individual corporate officers potentially
16 could be individually named, naming them would not have impacted the claims asserted in the
17 litigation or the settlement amount.

18 **B. Plaintiffs Pursued Liquidated Damages And Properly Waived Them As Part**
19 **of the Settlement.**

20 The Court has requested the Parties provide additional briefing that "shows cause as to
21 why additional or liquidated damages were not pursued." Order at 8.

22 Plaintiffs pursued liquidated damages against Cobalt as provided by the FLSA. *See*
23 Complaint, ¶¶ 75, 85 (seeking back wages "plus liquidated damages as provided by the FLSA,
24 29 U.S.C. § 216(b)"). The parties expressly discussed liquidated damages during the mediation
25 process, and the settlement includes liquidated damages for the regular rate error. *See* Sullivan
26 Weiss Decl. ¶¶ 5, 7 (Dkt. 23). Regarding unpaid overtime, Cobalt contended it never suffered or
27 permitted Production Partners or MLOAs to work off the clock and, thus, it did not violate the

1 FLSA. Based on evidence that Cobalt presented at the mediation, Plaintiffs agreed to discount
 2 any liquidated damages they might receive as part of the compromise reflected in the settlement.

3 Courts have discretion to deny an award of liquidated damages where the employer
 4 shows that, despite the failure to pay appropriate wages, the employer acted in subjective “good
 5 faith” and had objectively “reasonable grounds” for believing that the acts or omissions giving
 6 rise to the failure did not violate the FLSA. 29 U.S.C. § 260; *Perez v. Mountain Farms, Inc.*, 650
 7 F.3d 350, 375 (4th Cir. 2011); *Local 246 Util. Workers Union v. Southern Cal. Edison Co.*, 83
 8 F.3d 292, 297 (9th Cir. 1996) (“Liquidated damages are no longer automatic, however.”).

9 Here, Cobalt submitted evidence that supported such a defense. Specifically, in mid-
 10 2011, Cobalt transitioned Production Partners and Mortgage Loan Officers from exempt to non-
 11 exempt status. Goedde Decl., ¶ 4 (Dkt. 25). Cobalt did so in direct response to an opinion letter
 12 issued by the Department of Labor in 2010 specifically addressing the exempt status of mortgage
 13 loan officers and similar positions. At the time of this transition, Cobalt distributed a
 14 memorandum to all Production Partners and MLOs stating that they “will be paid an hourly
 15 wage for all hours worked.” Goedde Decl., ¶ 5, Ex. A. From 2011 to 2013, Cobalt provided
 16 payroll and timekeeping training to all new hires who were classified as non-exempt; as part of
 17 this training, Cobalt instructed employees to enter their time accurately so that Cobalt could pay
 18 them properly for all hours worked, including overtime. Goedde Decl., ¶ 6; Hargrove Decl.,
 19 ¶¶ 5-6 (Dkt. 27). Although Cobalt required that employees get prior approval before working
 20 overtime—as do many employers—Cobalt did not prohibit MLOs, Production Partners, or
 21 MLOAs from working overtime or refuse to pay overtime when it was worked. Goedde Decl.,
 22 ¶ 8; Nickerson Decl., ¶ 13 (Dkt. 24) (approximately 33% of all *Grewe* putative class members
 23 recorded some overtime hours). To the extent that employees did not record their overtime
 24 hours, there was evidence that they did so contrary to Cobalt’s instructions and without its
 25 knowledge. The availability of this defense was debated by the Parties during mediation and,
 26 ultimately, Plaintiffs agreed to discount liquidated damages as part of its settlement. Weiss
 27 Decl., ¶ 7 (Dkt. 23).

Based on the availability of this defense, the waiver of liquidated damages as part of a settlement is common and, in fact, the FLSA expressly permits such a waiver. *See, e.g., Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, 2016 U.S. Dist. LEXIS 4338, *24-25 (N.D. Cal. Jan. 13, 2016) (“Based on the Court’s own research, it does not appear common for a defendant in this district to offer to pay any liquidated damages as part of a proposed FLSA settlement agreement.”). Prior to 1949, the law prohibited the private waiver of FLSA rights to liquidated damages by settlement where there existed a bona fide dispute over FLSA coverage. *Schulte v. Gangi*, 328 U.S. 108, 116 (1946). As a result, employers were often reluctant to reach voluntary settlements with employees or the Department of Labor over claims of back pay because they could never ensure that they would not later be sued for liquidated damages and attorneys’ fees. *Sneed v. Sneed’s Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977). Consequently, in 1949 Congress amended the FLSA to allow employees to waive FLSA claims under the supervision of the Secretary of Labor. *See* 1949 Amendments to the FLSA, Pub. L. No. 393, 81 Stat. 923031 (codified at 29 U.S.C. § 216(c) (2004)). The amendments were designed to encourage employers to agree to voluntary settlements with the Wage and Hour division by permitting the waiver of liquidated damages. *Sneed*, 545 F.2d at 539. Plaintiffs’ agreement to waive liquidated damages is not inconsistent with the law and reflects Plaintiffs’ counsel’s assessment of the litigation risks.¹ *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.”) (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

C. Cobalt’s Financial Condition Is Sufficient to Cover the Settlement.

The Court has requested the Parties provide additional briefing that “provides evidence regarding Cobalt’s financial condition.” Order at 8. On November 6, 2014, Caliber Home Loans completed its acquisition of substantially all of the assets of Cobalt Mortgage, Inc. Cobalt

¹ Nothing in the record that calls into question the experience of counsel or raises doubt about counsel’s judgment.
JOINT SUBMISSION IN SUPPORT OF SECOND MOTION FOR APPROVAL
OF COLLECTIVE ACTION SETTLEMENT - 8

1 is in wind-down mode and no longer generating new loans with a revenue stream. A copy of
 2 Cobalt's profit and loss statements from January through March 2016 is included with this
 3 filing. See Ball Decl., ¶ 7, Ex. B. This statement demonstrates that as of March 2016 Cobalt had
 4 total equity in the amount of \$5,154,501.21.

5 **D. Plaintiffs Asked For a Longer Statute of Limitations Than In *Bell-Beals* and**
 6 **the Parties Negotiated a Compromise.**

7 The Court has requested the Parties provide additional briefing that "explains the parties'
 8 basis for calculating the recovery period and statute of limitations." Order at 8.

9 The date an action is commenced under the Fair Labor Standards Act (FLSA), 29
 10 U.S.C.S. § 201 *et seq.*, depends on whether it was instituted as a collective action. Non-
 11 collective actions are deemed commenced for purposes of an individual claimant's statute of
 12 limitations when the complaint is filed on behalf of that claimant. 29 U.S.C. § 256. However, an
 13 FLSA collective action is not commenced for purposes of a named plaintiff's limitations period
 14 until both of these occur: (1) a complaint is filed specifically naming the individual as a plaintiff;
 15 and (2) a written consent to suit is filed with the court by that plaintiff. 29 U.S.C. § 256; see
 16 *Thomas v. Talyst, Inc.*, 2008 U.S. Dist. LEXIS 15112, *1 (W.D. Wash. Feb. 28, 2008). The
 17 FLSA has a two-year statute of limitations for claims unless the employer's violation was
 18 "willful," in which case the statute of limitations is extended to three years. 29 U.S.C. § 255(a);
 19 *Flores v. City of San Gabriel*, 2016 U.S. App. LEXIS 10018, at *6 (9th Cir. June 2, 2016).

20 Here, Plaintiffs originally demanded that Defendant toll the statute of limitations and
 21 apply the statute of limitations used in the *Wheeler* action on the grounds that they should have
 22 been included in that collective action. Complaint, ¶ 12. Cobalt disagreed and the Parties
 23 debated the appropriate statute of limitations based on whether the job duties and compensation
 24 models for Production Partners and MLOAs supported including them in the *Wheeler* class.
 25 Cobalt also took the position that a two-year statute of limitations should apply to Plaintiffs'
 26 claims because there was evidence that its alleged conduct was not willful. See Section III.A,

1 *supra*. Ultimately, the parties agreed on a compromise: a three-year statute would run from
 2 March 1, 2016.

3 The Parties do not dispute that a different statute of limitations applies to Engelland's
 4 state court claims. However, as discussed above, the Parties agreed upon the limitation period in
 5 this action as part of a compromise. Plaintiffs originally wanted a longer statute of limitations
 6 than the one Engelland proposed applies to his claims in *Bell-Beals*. Moreover, the possible
 7 differences between recovery in the two actions is addressed by the notices the Parties prepared
 8 to be sent to members of the collective action. Both notices inform Washington-based
 9 employees of the lawsuit filed by Engelland, provide contact information for Mr. Engelland's
 10 attorney, and specifically state that accepting the settlement in *Grewe* will release any overtime
 11 claims they might have in *Bell-Beals*. Collective members who question the settlement may
 12 contact Mr. Engelland's attorney and will likely be informed of the different statute of
 13 limitations. Alternatively, if the Court desires, the notices may be revised to expressly inform
 14 employees of the different statutes of limitations, and the Parties are willing to prepare revised
 15 notices if the Court so instructs.

16 **E. The Court Should Approve the Letter from Mr. Tibbles to Potential Opt-in**
 17 **Plaintiffs.**

18 Although not specifically requested in the Court's Order, the Parties also briefly address
 19 the Court's potential concerns regarding the letter from Mr. Tibbles to potential opt-in plaintiffs.
 20 *See* Order at 7-8. Cobalt has the right to communicate with putative class members regarding the
 21 case so long as its communications do not undermine or contradict the proposed opt-in notice
 22 from the Court. *See, e.g., Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1085 (S.D.
 23 Cal. 2002) ("Based on the provisions of § 216(b) ..., the Court concludes there is no prohibition
 24 against pre-"opt-in" communication with a § 216(b) potential plaintiff, unless the communication
 25 undermines or contradicts the Court's [opt-in] notice."); *Talamantes v. PPG Indus., Inc.*, 2014
 26 WL 4145405, at *3-5 (N.D. Cal. Aug. 21, 2014) (refusing to strike employer's letter to potential
 27 opt-in employees explaining its positions regarding FLSA litigation).

Here, no part of Mr. Tibbles' letter contradicts the Parties' proposed Court-issued notice.² Cobalt prepared the letter in order to respond proactively to certain questions it received from potential opt-in plaintiffs in the *Wheeler* lawsuit. Following settlement of the *Wheeler* matter, Cobalt received a number of questions about the settlement notices. Tibbles Decl. ¶ 1. Employees expressed a lot of confusion, especially because plaintiffs in the *Bell-Beals* lawsuit communicated with *Wheeler* class members at the time notice and claim forms were sent to them, encouraging them not to join the *Wheeler* settlement, and implying that they would receive more money by waiting for *Bell-Beals* to be resolved. *Id.* ¶ 2. In addition, many former Cobalt employees work for the company that acquired Cobalt, some of whom expressed concern about if and how participating in the *Wheeler* settlement might impact their otherwise good personal and professional relationships with Mr. Tibbles, Mr. Gehre, and even their new employer, Caliber Home Loans. *Id.* ¶ 4. Cobalt prepared the notice in order to inform employees of the pending state court lawsuit and to provide them with contact information for plaintiffs' counsel in *Bell-Beals* should they have any questions about potential recovery. Cobalt also "encouraged" employees to accept the settlement in an effort to assuage concerns about their personal and professional relationships—but *only* if they concluded that the settlement was in their best interests. Dkt. 3-1 at 22 (Mr. Tibbles' letter stating "[o]f course, the decision of whether to accept the settlement is yours alone.").

F. The Court Should Approve the Settlement in Full and, at the Very Least, It Should Approve the Settlement as to MLOs and Non-Washington Production Partners.

Based on the further information provided above, the Parties request that the Court approve the settlement in full as a fair and reasonable compromise of a bona fide dispute. And even if the Court were to have any concerns regarding the settlement as to Washington Production Partners, it should approve the settlement as to all other positions. As the Court

² The Court's Order noted that Mr. Tibble's letter incorrectly stated that the *Bell-Beals* lawsuit was filed after *Grewe*. Order at 7. However, before the Court issued its Order, the Parties filed a Praecipe correcting that typographical error. See Dkt. 29.

1 stated in its order, it approved the very similar *Wheeler* settlement because no party objected to
 2 it. *See* Order at 7 (distinguishing the Court's evaluation of this settlement from the *Wheeler*
 3 settlement because no party objected to the *Wheeler* settlement and the Court, therefore,
 4 approved it). Here, Engelland has objected only to the settlement to the extent it covers
 5 Washington Production Partners. *See* Meeks Decl. ¶ 6 (Engelland's counsel indicated to Mr.
 6 Meeks that he objects to the settlement only to the extent it covers Washington Production
 7 Partners). Because no one has raised any objection regarding the settlement to the extent it
 8 covers MLOAs and non-Washington Production Partners, the Court should follow its *Wheeler*
 9 decision and approve this settlement at least to that extent.

10 IV. CONCLUSION

11 For the reasons discussed above and as set forth in their moving papers and opposition to
 12 Engelland's Motion to Intervene, the Parties renew their position that the prior settlement is a fair
 13 and reasonable resolution of the parties' bona fide disputes as to liability and damages under the
 14 federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* The Parties respectfully
 15 request that the Court approve the settlement.

16 DATED this 29th day of June, 2016.

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JOINT SUBMISSION IN SUPPORT OF SECOND MOTION FOR APPROVAL
 OF COLLECTIVE ACTION SETTLEMENT - 12

[2:16-cv-00577]

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on June 29, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 29th day of June, 2016.

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